Supreme Court, U.S.
FILED
NOV 5 1996
CLERK

No. 96-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

vs.

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I. The Court Should Grant The Petition To Correct The Second Circuit's Misconstruction Of The *Fort Halifax* Test And To Resolve Confusion Among The Circuits As To The Appropriate Legal Standard.

In her opposition brief, Schonholz fails to reconcile the two divergent approaches to determining when an offer of severance benefits constitutes an ERISA "plan" that have emerged since this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The first approach adheres to the *Fort Halifax* test and focuses the inquiry on whether an "*ongoing administrative program*" is required. *See, e.g., Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir.

1995)(focusing on whether severance offers required complicated administrative apparatus either to calculate or distribute promised benefits); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992)(focusing on whether offer required creation of new administrative scheme); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) (same).[1]

The second approach, taken in *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993), and *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989), and pushed to a new extreme by the Second Circuit here, improperly equates the need for any discretionary decision-making with the existence of an "ongoing administrative program."

Schonholz tries to make much of the fact that in some of the cases in which the first approach has been followed (*e.g.*, *Kulinski* and *Fontenot*), the courts have distinguished prior cases in part on the absence of discretionary decision-making. Schonholz misses the point. LIJ does not contend that it is improper for courts to consider the extent to which discretionary decisions must be made as a factor in determining whether an ERISA plan exists. What *is* improper, though, is for courts to equate the need or even the potential for the exercise of discretion with the existence of, let alone the requirement for, an ongoing administrative program, as the Second Circuit did here, and as the courts did in *Pane* and *Bogue*.[2]

Schonholz also argues that this more expansive approach is consistent with this Court's holding in *Fort Halifax*.

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[1] *See also Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); *Kulinski v. Medtronics Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994); *James v. Fleet/Norstar Fin.Group, Inc.*, 992 F.2d 463 (2d Cir. 1993); *Fontenot v. NL Indus. Inc.*, 953 F.2d 960 (5th Cir. 1992).

[2] The exercise of discretion, potential or actual, may implicate, for example, the task of computing eligibility or aggregate compensation for a body of employees and still not require an ongoing administrative program (and, hence, not be under ERISA). *James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463 (2d Cir. 1993).

Schonholz is again mistaken.[3] The *Fort Halifax* test is rooted in the purpose of pre-emption: to "'eliminat[e] the threat of conflicting and inconsistent State and local regulation.'" *Fort Halifax,* 482 U.S. at 9 (quoting 120 Cong.Rec. 29197 (1974)). Thus, the inquiry must focus not on whether *some* administration is required, but rather on whether, in order to maintain a benefits plan, an employer must implement an ongoing administrative apparatus that requires protection from a "patchwork scheme of regulation." *Id.* at 11. Otherwise, any offer of severance *benefits* could be construed as an ERISA *plan*; a proposition that is unsupported by the statute and was flatly rejected by this Court as imposing an unintended burden (one that might persuade employers not to grant benefits). *See Fort Halifax*, 482 U.S. at 11-12. The courts in *Schonholz, Bogue* and *Pane* completely disregarded this reasoning and, as a consequence, developed a conflicting legal standard.

Here, for example, no administrative apparatus was ever established, as Schonholz concedes (Opp. Br. at 8, n. 5). Schonholz argues vociferously that "*Fort Halifax* and its progeny look to the *need* for an administrative program, not to its implementation," implying that at some future unspecified time, LIJ would have been required to develop an administrative apparatus. *Id.* (Emphasis in original, citations omitted.) Yet, Schonholz fails to recognize that by the time the May 3 Memorandum was revoked, it had (according to Schonholz) been in effect for almost two years. Further, (again, according to Schonholz), LIJ had already made one of the two "managerial assessments and decisions inherent in the terms of the Severance Plan" (Opp. Br. at 8) that might have been

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[3] LIJ does not contend, as Schonholz erroneously suggests, that the Second Circuit's decision dramatically alters this Court's precedent because it makes all of ERISA's substantive and procedural requirements applicable to all severance offerings (Opp. Br. at 4). Rather, the Second Circuit's decision dramatically alters the Fort Halifax test by equating the need for discretionary decision-making with the existence of an ongoing administrative program. By doing so, the Second Circuit's decision will make ERISA applicable to severance offerings that are not properly ERISA *plans* and force employers to comply with all *relevant* requirements.

required; namely, determining whether Schonholz was being terminated for cause. Still, as Schonholz concedes, no administrative apparatus had been established. The second of these "managerial assessments" -- a determination as to whether Schonholz, after a year, should have been entitled to an additional six months of benefits -- might never have been required. Even if the issue had arisen, making such a momentary determination would not have required an administrative program in any sense of the term, never mind a program that required protection from a patchwork scheme of regulation. *See Fort Halifax,* 482 U.S. at 13-15. *Cf. James*, 992 F.2d at 466.

In finding that the need for such limited discretionary decision-making transformed the May 3 Memorandum into an ERISA plan, the Second Circuit misconstrued this Court's test. [4] This is the same approach followed by the courts in *Bogue* and *Pane*.[5] The confusion this approach has sown is exacerbated by the fact that conflicts exist within the same Circuits, making it impossible for an employer to gauge which approach will be applied. *Compare James, 992* F.2d at

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[4] While Schonholz contends that managerial discretion was only one factor examined by the Court, the second proffered factor -- "whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria" (Opp. Br. at 7, n. 4; A-7) -- ultimately focuses on the same issues involved in the managerial discretion analysis. As to the third stated factor -- whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits" -- it is unclear how this factor is probative of whether the offer of severance benefits implicates an administrative apparatus. A single employment contract with the promise of severance pay in the event of termination could justify such a perception, yet would not give rise to an ERISA *plan.*

[5] Schonholz also attempts to make much of the fact that the courts in *Schonholz, Pane* and *Bogue* properly identified the *Fort Halifax* test by name, and criticizes LIJ for "merely ... focusing on the *results*" of these cases (Opp. Br. at 7, n. 4). It seems that Schonholz has it backwards: a court's mere incantation of a test does not mean the court has it right; it is the "result," as reflected in the court's analysis and holding, that is probative of whether the court is applying the proper legal standard.

466, with *Schonholz; Belanger*, 71 F.3d at 455-56, with *Simas v. Quaker Fabric Corp.*, 6 F.3d at 849 (1st Cir. 1993); *Angst*, 969 F.2d at 1539-41, with *Pane*, 868 F.2d at 635; and *Delaye* 39 F.3d at 237-38, with *Bogue*, 976 F.2d at 1323. Such intra-circuit conflicts, and the attendant uncertainties, are precisely what ERISA pre-emption was intended to avoid.

Accordingly, review of this case is necessary to correct the Second Circuit's misconstruction of the *Fort Halifax* test and to provide clarification to the Circuits.

II. Plaintiff's Promissory Estoppel Claim Is The Precise Claim That Has Split The Circuits

In its Petition, LIJ demonstrated that the Fifth, Ninth, Tenth and Eleventh Circuits have held that courts may not fashion a federal common law cause of action for promissory estoppel under ERISA, while the Second, Third and Seventh Circuits have recognized such a claim. Schonholz does not directly dispute this, because she cannot. Instead, she focuses this Court on irrelevant issues.[6]

Schonholz's opposition is based on her contention that there are two instances in which the use of estoppel principles under ERISA is appropriate. The first, according to Schonholz, is when a plaintiff seeks to use equitable estoppel with regard to statements allegedly made by an employer that purport to interpret an ambiguous provision of an ERISA plan.

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[6] Schonholz's strategy is bold and relies on misdirection. Schonholz admits that the courts in *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995); *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989), properly refused to recognize a claim for promissory estoppel (Opp. Br. at 5, 10). She then seeks to avoid the implication of that admission by suggesting that her case is factually distinguishable from those cases. As shown below, it is not. Her claim is the precise type of claim at issue in all of the cases cited by LIJ in its Petition.

Whether the use of equitable estoppel is appropriate in such a case is irrelevant. As Schonholz herself acknowledges, that was not the circumstance presented in the cases cited by LIJ, nor is it the circumstance presented here. Rather, in the instant case as well as in all of the cases cited by LIJ, a plaintiff, who, but for an alleged promise, would be ineligible for benefits, seeks to use promissory estoppel to create a claim under ERISA.

In *Devoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994); *cert. denied*, 115 S. Ct. 1381 (1995), for example, the plaintiff alleged that his employer had promised to maintain his enrollment in a plan that provided a certain level of benefits. The employer allegedly breached this promise by enrolling the plaintiff in a plan that provided an inferior level of benefits. There was no ambiguity in the plan. Plaintiff sued to enforce the employer's alleged promise.

Similarly, in *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994), the employer allegedly breached its promise to maintain plaintiff's enrollment in a particular medical reimbursement plan. Again, the case did not involve an alleged representation regarding an ambiguous provision of a plan but rather an action to enforce the employer's alleged promise.

Here, as in *Devoll* and *Miller*, Schonholz is not seeking to use equitable estoppel with regard to a proffered interpretation of an ambiguous provision of a plan. Indeed, Schonholz neither alleges the existence of an ambiguity nor contends that the clear terms of the May 3 Memorandum limited LIJ's right to revoke the severance benefits. Rather, as in *Devoll* and *Miller*, Schonholz seeks to use promissory estoppel to enforce an alleged promise on the part of LIJ to extend her severance benefits. This is made clear by Second Circuit's analysis (*e.g.*: "[a]ssuming that the jury concludes that LIJ promised to extend Schonholz's benefits, that LIJ should have known that Schonholz would rely, that Schonholz did in fact rely, and that Schonholz was injured by that reliance, it is clear to us that she will be able at least to contend that an injustice would result if the promise is not enforced"). A-14.

The Second, Third and Seventh Circuits recognize such a claim. The Fifth, Ninth, Tenth and Eleventh do not.

The second instance that Schonholz contends permits the use of estoppel principles is "when an employer makes a written promise that is at the same level of formality as a plan creation document which lacks an amendment procedure and an employee reasonably and detrimentally relies on that promise." Opp. Br. at 10. Schonholz even goes so far as to characterize this as the holding of the Second Circuit. *Id.*

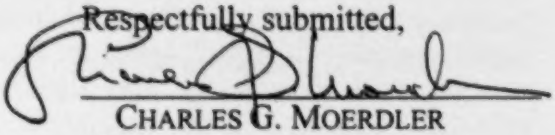
Schonholz's argument is disingenuous. The Second Circuit found that Schonholz stated two distinct claims under ERISA: (1) a contractual vesting claim, and (2) a promissory estoppel claim. To be cognizable, the contractual vesting claim requires a finding that the alleged "vesting" document is of the same level of formality as the alleged "plan creation document." The promissory estoppel claim, on the other hand, has nothing to do with the relative levels of formality of the May 3 Memorandum and the December 18 letter. Again, this is evident from the Second Circuit's decision. The court analyzed the claim based on the four traditional elements of promissory estoppel: a promise, reliance, injury and injustice (A-12). There is nothing in the court's opinion to suggest that its recognition of a promissory estoppel claim was contingent on a finding that the December 18 letter was of the same level of formality as the May 3 Memorandum.

Schonholz cannot escape the fact that her claim for promissory estoppel is the precise claim which has split the Circuits. Schonholz, herself, has admitted that it is inappropriate for federal courts to fashion this type of relief, and does not dispute the importance of having a uniform body of law under ERISA. Accordingly, the Petition should be granted to permit review of this important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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